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## Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps Note

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## Note

### DOWNLOADING MINIMUM CONTACTS: THE PROPRIETY OF EXERCISING PERSONAL JURISDICTION BASED ON SMARTPHONE APPS

JOANNA SIBILLA TAATJES

*As technology has changed the way in which individuals interact with each other, courts have sought to address how non-physical contacts with a forum state should factor into the analysis of whether to exercise personal jurisdiction over an out-of-state defendant. Courts have yet to decide whether a defendant should be subject to personal jurisdiction in a state where the defendant's only contacts with the forum took place through smartphone apps. The growing prevalence of smartphones and apps, however, has brought with it the need for courts to consider exactly that issue. Apps are in many ways a combination of the Internet and computer software, and courts have addressed the personal jurisdiction implications of both. So should apps be treated the same as the Internet and websites for the minimum contacts inquiry? Should they be treated more like computer software?*

*This Note applies four personal jurisdiction frameworks to a hypothetical case where the defendant's only contact with the forum state arises from the download of a smartphone app that he created. Under three of the frameworks, I conclude that a court would likely find that the app created sufficient minimum contacts with the forum state such that exercising personal jurisdiction would be constitutional.*

*However, establishing minimum contacts does not end the analysis. Courts must also determine whether exercising personal jurisdiction over the defendant would be fair. I argue that the unique circumstances surrounding apps and their creation are such that exercising personal jurisdiction may not always be fair even when minimum contacts have been established.*

*Courts were originally hostile to finding minimum contacts solely on the basis of a defendant's Internet contacts with the forum state. However, as the importance and prevalence of the Internet grew, so did courts' acceptance of Internet contacts as a basis for exercising personal jurisdiction. Smartphone apps are the new frontier for wireless interaction. This Note concludes that the traditional personal jurisdiction analysis remains the best way to assess whether a defendant's app contacts with a forum state are sufficient to justify the exercise of personal jurisdiction.*

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# DOWNLOADING MINIMUM CONTACTS: THE PROPRIETY OF EXERCISING PERSONAL JURISDICTION BASED ON SMARTPHONE APPS

JOANNA SIBILLA TAATJES\*

## I. INTRODUCTION

Imagine a company that is in the business of gathering data on weather conditions from around the world. The company employs meteorologists to create forecasts of what the weather will be for the next week in any given location based on the collected data. This company expends considerable resources to collect the data, analyze it, and create the forecasts. Once the forecasts are made, media outlets and websites, such as the *New York Times* and Google, pay a licensing fee to use and publish the forecasts.

The company discovers that a smartphone application (“app”) that provides weather forecasts for locations around the world has been created, and the company believes that the forecasts contained in the app are its own. The app is available as a free download, but the creator profits from the app by selling advertising space on the bottom of the screen when the app is displayed. When a user opens the app, the geolocation technology built into the smartphone immediately displays the weather for the phone’s current location. Users may also use the search function to learn the weather for other places. Further investigation reveals that the app is based on the company’s information and that the maker of the app is not paying the licensing fee.

The company brings suit in Connecticut, where it is incorporated and has its principal place of business. The app creator is a single individual who resides in California, and he is not in the business of creating apps for a living. He files a motion to dismiss, claiming lack of personal jurisdiction.<sup>1</sup> The creator’s only contact with Connecticut is the fact that smartphones in Connecticut can download and have downloaded the app. Is personal jurisdiction proper?<sup>2</sup>

This situation presents the novel question of whether personal

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<sup>1</sup> Personal jurisdiction is a doctrine governing “[a] court’s power to bring a person into its adjudicative process.” BLACK’S LAW DICTIONARY 930 (9th ed. 2009).

<sup>2</sup> These entities and litigation are fictional. The scenario, however, is loosely based on the facts presented in *West World Media, LLC v. Ikamobile Ltd.*, 809 F. Supp. 2d 26, 27–29 (D. Conn. 2011).

jurisdiction can and should be premised on a defendant's "app" contacts with a forum state.<sup>3</sup> The primary question is whether the fact that the app can be downloaded and accessed in the forum state creates sufficient minimum contacts.<sup>4</sup> If it does, the analysis next considers whether exercising personal jurisdiction over the app-creating defendant would violate "traditional notions of fair play and substantial justice."<sup>5</sup>

Part II of this Note begins by briefly examining the technology behind how smartphones, apps, and the Internet operate. Because Internet personal jurisdiction doctrine is informed in part by an understanding of how the Internet works, comparing how the Internet functions to how smartphones and apps function will be instructive when examining where apps fit into the current personal jurisdiction framework.

Part III then examines existing personal jurisdiction doctrines into which apps may fit. Based on the technology that is discussed in Part II, this Note argues that smartphone apps are essentially a combination of a computer program and the Internet, and therefore Part III examines how personal jurisdiction is applied to those scenarios.

Part IV discusses how the existing personal jurisdiction doctrines would be applied to apps and whether one of the current doctrines sufficiently addresses this novel application. Part IV.A addresses the question of minimum contacts, and Part IV.B addresses whether exercising personal jurisdiction would satisfy the fairness requirements. While the determination that the defendant has established minimum contacts is dispositive in most cases,<sup>6</sup> this Note will argue that apps and how they are created present compelling issues regarding whether exercising personal jurisdiction would violate fair play and substantial justice.

## II. BACKGROUND ON SMARTPHONES, APPS, AND THE INTERNET

The Internet is a "global network of interconnected computers which allows individuals to instantaneously communicate with other[s]."<sup>7</sup> The

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<sup>3</sup> This Note addresses only the question of specific personal jurisdiction.

<sup>4</sup> See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring that an out-of-state defendant have sufficient minimum contacts with the forum state before a court may exercise personal jurisdiction over the defendant).

<sup>5</sup> *Id.*

<sup>6</sup> See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring) ("This is one of those rare cases in which 'minimum requirements inherent in the concept of fair play and substantial justice . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (alteration in original) (internal quotation marks omitted))).

<sup>7</sup> Quinn K. Nemeyer, Comment, *Don't Hate the Player, Hate the Game: Applying the Traditional Concepts of General Jurisdiction to Internet Contacts*, 52 *LOY. L. REV.* 147, 165 (2006).

Internet can be accessed anywhere in the world,<sup>8</sup> and it is indifferent to the physical location of the machines that are accessing it. As a result, users frequently do not know the physical location of the other users and entities with whom they are interacting.<sup>9</sup> Unlike with print media, content that is posted online is “continuous and permanent.”<sup>10</sup>

Smartphones were introduced to the American market in the mid-to-late 2000s. These new devices essentially merged existing telephone and computer technologies into a single device<sup>11</sup> which was not only capable of making phone calls, but also of accessing the Internet and receiving and sending email. Demand for these new phones was high, and currently 35% of American adults own a smartphone.<sup>12</sup>

Those who own smartphones take advantage of the device’s non-traditional phone capabilities. Eighty-seven percent of smartphone owners report using their phone to access the Internet or their email, including 68% who use their smartphone to access the Internet on a typical day.<sup>13</sup> Of those who use their smartphone to access the Internet or their email, 28% use their smartphone for most of their online activity.<sup>14</sup>

As the market for smartphones grew, so did the market for apps.<sup>15</sup> An “app,” which is the popular term for a software application, is a program that “facilitates performance of a task or retrieval of information.”<sup>16</sup> Apps were originally designed to make cell phones more like computers by allowing users to complete tasks such as email.<sup>17</sup> Today, however, there is an app for almost any conceivable task. There are apps that allow users to do tasks as varied as checking the stock market, uploading photos to social networking websites, and monitoring sports and fitness goals.<sup>18</sup> Apple’s App Store currently offers over 500,000 apps for download<sup>19</sup> and the

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<sup>8</sup> Allison MacDonald, Comment, *YouTubing Down the Stream of Commerce: Eliminating the Express Aiming Requirement for Personal Jurisdiction in User-Generated Internet Content Cases*, 19 ALB. L.J. SCI. & TECH. 519, 532 (2009).

<sup>9</sup> James P. Donahue, *Personal Jurisdiction*, in INTERNET LAW AND PRACTICE 9-1, 9-13 (2011).

<sup>10</sup> MacDonald, *supra* note 8, at 532–33.

<sup>11</sup> Greg Snodgrass, Note, *Business Solutions to the Alien Ownership Restriction*, 61 FED. COMM. L.J. 457, 459 (2008).

<sup>12</sup> AARON SMITH, PEW RES. CTR., 35% OF AMERICAN ADULTS OWN A SMARTPHONE 2 (2011), available at <http://www.pewinternet.org/Reports/2011/Smartphones.aspx>.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 14.

<sup>15</sup> The Apple “App Store” currently makes available over 500,000 apps for download by iPhone users. *iPhone*, APPLE, <http://www.apple.com/iphone/from-the-app-store/> (last visited Nov. 2, 2011).

<sup>16</sup> David Bell & Hope Hughes, *One Bad App Spoils the Bunch: Brand Protection in the App Era*, 74 TEX. B.J. 218, 219 (2011).

<sup>17</sup> *What is a Cell Phone App?*, WISEGEEK, <http://www.wisegeek.com/what-is-a-cell-phone-app.htm> (last visited Nov. 2, 2011).

<sup>18</sup> See *iPhone*, APPLE, <http://www.apple.com/iphone/from-the-app-store/> (last visited Nov. 2, 2011) (listing the different kinds of apps available for download from the Apple “App Store”).

<sup>19</sup> *Id.*

Android Market offers more than 200,000 apps.<sup>20</sup>

Apps are not created solely by smartphone and software companies. There are a number of do-it-yourself app-development websites that guide individuals through the steps of creating an app.<sup>21</sup> Some websites even use a simple “point-and-click” technology so that individuals need not know how to write code.<sup>22</sup> Because some of the websites provide the service for free<sup>23</sup> and are relatively easy to use, almost anyone with Internet access can create an app.

Some apps come pre-installed on a smartphone,<sup>24</sup> while others can be downloaded by accessing an app store hosted by the maker of the smartphone.<sup>25</sup> These stores are only accessible when using the smartphone.<sup>26</sup> When a user selects the app that he wants to download, information is sent to a host computer requesting the information, and the host computer then sends the app files to the smartphone.<sup>27</sup> Once an app has been downloaded and installed, using it is similar to using a computer.<sup>28</sup> Some apps, known as “web apps,” require access to the Internet to function after they have been downloaded;<sup>29</sup> others do not require Internet access after the original download.

Apps and the Internet are similar in many ways. The most significant difference is that the app is downloaded directly to the phone, and therefore the app occupies a “physical” presence on the smartphone similar to software on a computer. For the purposes of assessing minimum contacts, it is useful to think of apps as a combination between the Internet and computer software. However, because apps are downloaded from the Internet and frequently access the Internet after they have been downloaded, the comparison to the Internet and websites is stronger than the comparison to computer software, which exists solely on an individual’s computer.

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<sup>20</sup> Kim Komando, *Make Your Own Smartphone Apps*, USA TODAY, Sept. 8, 2011, <http://www.usatoday.com/tech/columnist/kimkomando/story/2011-09-09/Make-your-own-smartphone-assp/50322124/1>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *See id.* (discussing some of the websites that provide app-building services and their cost).

<sup>24</sup> *iPhone*, APPLE, <http://www.apple.com/iphone/from-the-app-store/> (last visited Nov. 2, 2011).

<sup>25</sup> Elijah Chau, *How Do Apps Work on a Cell Phone?*, EHOW.COM (Apr. 16, 2012), [http://www.ehow.com/facts\\_7789400\\_do-apps-work-cell-phone.html](http://www.ehow.com/facts_7789400_do-apps-work-cell-phone.html).

<sup>26</sup> *Id.*

<sup>27</sup> *See* Natalya Shmulevich, Note, *A Minimum Contacts and Fairness Examination of Personal Jurisdiction over Providers of Free Downloads on the Internet*, 13 MEDIA L. & POL’Y 55, 68–69 (2004) (explaining how Internet downloads work).

<sup>28</sup> *Id.*

<sup>29</sup> *Web Apps*, APPLE, <http://www.apple.com/webapps/whatarewebapps.html> (last visited Nov. 2, 2011).

### III. CURRENT PERSONAL JURISDICTION DOCTRINE

It is useful to compare smartphone apps to the Internet and to computer software because apps essentially combine these two forms of technology. Because smartphone apps are similar to the Internet and computer programs, perhaps the personal jurisdiction doctrines that would be applicable in each of those situations can be applied to apps. This Part first discusses the current state of personal jurisdiction doctrine, as traditional principles of personal jurisdiction may be best suited to evaluate whether apps create sufficient minimum contacts with the forum state. The Part then examines the two most prominent doctrines for determining whether personal jurisdiction over a defendant based on the defendant's Internet contacts with the forum state is proper. Finally, after discussing Internet personal jurisdiction doctrine, this Part examines stream-of-commerce jurisdiction, which may be applied to the analogy of an app as computer software and has also been used in examining contacts on the "electronic stream-of-commerce."

#### A. *Traditional Personal Jurisdiction Doctrine*

The Due Process Clause of the U.S. Constitution permits a court to exercise personal jurisdiction over a defendant in any state with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."<sup>30</sup> The requirement that a defendant have minimum contacts with the forum state performs two functions.<sup>31</sup> First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum,"<sup>32</sup> an interest typically described in terms of "reasonableness or fairness."<sup>33</sup> Second, "it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system";<sup>34</sup> this interest is typically referred to in terms of "federalism" or "sovereignty."<sup>35</sup>

In determining whether a defendant has established minimum contacts, courts will look at the quality of the relationship between the defendant and the forum state. An important inquiry is whether the defendant has

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<sup>30</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>31</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

<sup>32</sup> *Id.* at 292.

<sup>33</sup> *The Supreme Court, 2010 Term—Leading Cases, Constitutional Law, Personal Jurisdiction Stream-of-Commerce Doctrine: J. McIntyre Machinery, Ltd. v. Nicasastro*, 125 HARV. L. REV. 172, 311 (2011) [hereinafter *Stream-of-Commerce*].

<sup>34</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>35</sup> *Stream-of-Commerce*, *supra* note 33, at 311.

“purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>36</sup> Courts will also examine whether it was foreseeable that the defendant could be haled into court in the forum state based on his contacts with the forum.<sup>37</sup>

If the defendant has sufficient minimum contacts with the forum state, the court will next determine whether exercising jurisdiction over the out-of-state defendant would comport with traditional notions of fair play and substantial justice. A finding of minimum contacts raises the presumption that exercising jurisdiction would be fair,<sup>38</sup> but that presumption may be defeated by the particular facts of the case. Courts will consider: (1) the burden on the defendant of having to litigate in a foreign state; (2) the forum state’s interest in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.<sup>39</sup> This fairness inquiry is meant to be applied flexibly to account for the facts presented and the circumstances of the parties in each case.<sup>40</sup>

If the defendant has established minimum contacts and the court is satisfied that it would not be unfair to subject the defendant to suit in the forum state, then the exercise of personal jurisdiction is constitutional.

### B. *Internet Jurisdiction*

When the Internet first came into existence, courts were generally reluctant to exercise personal jurisdiction over a defendant based solely on the defendant’s Internet contacts with the forum state.<sup>41</sup> Fitting the Internet

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<sup>36</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

<sup>37</sup> See *World-Wide Volkswagen*, 444 U.S. at 297 (“[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”).

<sup>38</sup> Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 746 (2012) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

<sup>39</sup> *World-Wide Volkswagen*, 444 U.S. at 292.

<sup>40</sup> Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 446 (1991).

<sup>41</sup> Shmulevich, *supra* note 27, at 60 (“[C]ourts were reluctant to find jurisdiction without a non-Internet contact.”). In one early case, however, the United States District Court for the District of Connecticut exercised personal jurisdiction over an out-of-state defendant based solely on the defendant’s website. See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996). The defendant operated a website advertising its goods and services, and the website contained a phone number at which customers could contact the defendant. *Id.* at 163. Treating the website as an advertisement which was continuously available on the Internet, the court held that the defendant had purposely availed itself of doing business in Connecticut such that personal jurisdiction over the defendant was proper. *Id.* at 165.

into traditional notions of personal jurisdiction posed significant doctrinal issues. Discussing some of these issues, the court in *Digital Equipment Corp. v. AltaVista Technology, Inc.*<sup>42</sup> stated:

The Internet has no territorial boundaries. . . . [A]s far as the Internet is concerned, not only is there perhaps “no there there,” the “there” is *everywhere* where there is Internet access. When business is transacted over a computer Web-site accessed by a computer in Massachusetts, it takes place as much *in* Massachusetts, literally or figuratively, as it does anywhere.<sup>43</sup>

However, as the Internet became a more integral and pervasive technology, courts began to exercise personal jurisdiction in cases where a defendant’s only contacts with a forum state were Internet based.<sup>44</sup>

When courts began exercising personal jurisdiction based on a defendant’s Internet contacts, they generally relied on traditional personal jurisdiction principles.<sup>45</sup> Many of the cases that upheld the exercise of personal jurisdiction over a defendant based solely on the defendant’s Internet contacts were predicated on the idea that the defendant was either purposefully availing himself of the privilege of doing business in the forum state or that the defendant had purposefully directed his activities at the state.<sup>46</sup> In essence, the rationale was that a defendant could have structured his or her online conduct so that it was not available in a particular forum or was only available in some forums.<sup>47</sup> However, this rationale ignored the realities of the Internet—the Internet is structured such that it is not possible to avoid contact with a specific forum apart from completely staying off the Internet and thereby avoiding all forums.<sup>48</sup>

Therefore, as courts searched to determine whether minimum contacts existed on a case-by-case basis, an understanding of how the Internet functioned became more important to the analysis.<sup>49</sup> Courts developed tests for assessing personal jurisdiction that were specific to the Internet context.<sup>50</sup> This Part discusses the two most prominent Internet jurisdiction

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<sup>42</sup> 960 F. Supp. 456 (D. Mass. 1997).

<sup>43</sup> *Id.* at 462.

<sup>44</sup> See JONATHAN D. HART, INTERNET LAW: A FIELD GUIDE 638 (6th ed. 2008) (“In some cases, the existence of a website that is accessible by residents of a given state may be the only ‘contacts’ the defendant has within that state.”).

<sup>45</sup> *Id.*

<sup>46</sup> Donahue, *supra* note 9, at 9-14.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 9-15.

<sup>49</sup> Nemeyer, *supra* note 7, at 168–69 (discussing how courts modified their approach to personal jurisdiction as they came to better understand the Internet).

<sup>50</sup> HART, *supra* note 44, at 638.

tests: the *Zippo* “sliding scale” test and the effects test.<sup>51</sup>

### 1. *Zippo* “Sliding Scale” Test

In 1997, the District Court for the Western District of Pennsylvania developed a test to determine whether the Internet contacts of a defendant were sufficient to establish minimum contacts.<sup>52</sup> In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, the court articulated a “sliding scale” test wherein “the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”<sup>53</sup>

The case involved a dispute between two companies over an Internet domain name, and the plaintiff sought to sue the defendant, a California company, in Pennsylvania.<sup>54</sup> The defendant did not have any offices, employees, or agents in Pennsylvania.<sup>55</sup> Instead, the defendant’s contacts with Pennsylvania occurred almost exclusively through its website, which could be accessed from within Pennsylvania.<sup>56</sup> The website contained information about the company, advertisements, and an application for customers to receive access to an Internet news service that the defendant produced.<sup>57</sup> A customer who wanted to subscribe to the news service did so by filling out an online application and paying a fee either over the Internet or the phone.<sup>58</sup> Approximately two percent of the defendant’s subscribers were Pennsylvania residents, and the defendant had contracted with seven Internet service providers in Pennsylvania to permit their customers to access the defendant’s news service.<sup>59</sup> The defendant filed a motion to dismiss, claiming that it did not have sufficient minimum contacts with Pennsylvania for the court’s exercise of personal jurisdiction to be constitutional.<sup>60</sup>

The court identified three kinds of websites for the purpose of determining whether minimum contacts exist: (1) passive websites; (2) interactive websites; and (3) websites that fall somewhere between passive and active.<sup>61</sup> Passive websites describe websites where the

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<sup>51</sup> Another test used by courts is known as the “totality of contacts” analysis wherein the court considers the defendant’s Internet contacts along with the defendant’s more traditional contacts, such as physicality. *Id.* at 639. The “totality of contacts” test is not discussed in this Note because the analysis considers more than just the Internet contacts of the defendant.

<sup>52</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1120.

<sup>55</sup> *Id.* at 1121.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1124.

defendant has “simply posted information on an Internet [website] which is accessible to users in foreign jurisdictions.”<sup>62</sup> In cases such as this, the court held that the exercise of personal jurisdiction is improper.<sup>63</sup> On the other end of the spectrum are interactive websites where the defendant “clearly does business over the Internet.”<sup>64</sup> Because doing business involves “enter[ing] into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet,” exercising personal jurisdiction is proper.<sup>65</sup> In the middle ground are interactive websites where the user can exchange information with a host computer. To determine whether the defendant has sufficient minimum contacts in these cases, a court will “examin[e] the level of interactivity and commercial nature of the exchange of information that occurs on the [website].”<sup>66</sup> When a website falls into this middle ground, it must be shown that the defendant has *actually* interacted with residents of the forum state; simply having the potential to do so through the website is insufficient to establish personal jurisdiction.<sup>67</sup>

The court concluded that the defendant’s website fell into the interactive category because the defendant entered into contracts with residents and companies of Pennsylvania from which it profited.<sup>68</sup> Based on those contacts with Pennsylvania, the court held that the defendant had purposefully availed itself of doing business in Pennsylvania, and therefore, jurisdiction was proper.<sup>69</sup>

Since the sliding scale test was articulated in *Zippo*, nearly every Circuit has adopted the test in one form or another.<sup>70</sup> A central part of

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Most courts have essentially combined the analysis of interactivity and commerciality by holding that in order for a website to be interactive, the defendant must profit, or have the potential to profit, commercially from the website. Shmulevich, *supra* note 27, at 63.

<sup>67</sup> See, e.g., *People Solutions, Inc. v. People Solutions, Inc.*, No. 3:99-CV-2339-L, 2000 U.S. Dist. LEXIS 10444, at \*11 (N.D. Tex. July 26, 2000) (“Personal jurisdiction should not be premised on the mere possibility, with nothing more, that Defendant may be able to do business with Texans over its web site; rather, Plaintiff must show that Defendant has ‘purposefully availed itself’ of the benefits of the forum state and its laws.”).

<sup>68</sup> *Zippo*, 952 F. Supp. at 1125.

<sup>69</sup> *Id.* at 1126–27.

<sup>70</sup> Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 79 (2011). Two Circuits have explicitly rejected the *Zippo* framework. See *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007) (stating that while the *Zippo* framework may help frame the judicial inquiry in some cases, it does not amount to a separate framework for analyzing Internet jurisdiction cases; instead, “traditional statutory and constitutional principles remain the touchstone of the inquiry” (quoting *Best Van Lines, Inc. v. Walker*, No. 03 Civ. 6585, 2004 U.S. Dist. LEXIS 7830, at \*9 (S.D.N.Y. May 4, 2004))); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510–11 (D.C. Cir. 2002) (holding that traditional notions of personal jurisdiction can and should be adapted to address a

*Zippo*'s continued prominence in assessing Internet jurisdiction cases is due to the "court's translation of . . . amorphous due process principles to the Internet setting."<sup>71</sup> However, the *Zippo* test has faced increasing criticism in recent years.<sup>72</sup> One criticism is that at the time that *Zippo* was decided, many websites were passive; today however, there remain few truly passive websites.<sup>73</sup> As the scope and technological abilities of the Internet have increased, the *Zippo* test has failed to evolve to address new factors which may be useful in determining whether a defendant has established minimum contacts with the forum state.<sup>74</sup>

## 2. *Calder v. Jones Effects Test*

Many courts have also adopted the "effects test"—under which personal jurisdiction over an out-of-state defendant is proper if the defendant directed his or her activity at a particular forum—to address Internet personal jurisdiction cases.<sup>75</sup> The effects test was first articulated in *Calder v. Jones*,<sup>76</sup> wherein the plaintiff Shirley Jones brought suit in California claiming that she had been libeled by an article written and edited by the defendants in Florida.<sup>77</sup> The article was published in a weekly newspaper with a circulation of approximately 600,000 in California, the state in which Jones lived and worked.<sup>78</sup> Aside from the circulation of the newspaper, the defendant did not have any substantial, or indeed minimum, contacts with the state.<sup>79</sup> However, the Supreme Court held that personal jurisdiction over the defendants in California was proper because "California [is] the focal point both of the story and of the harm suffered."<sup>80</sup> The Court went on to hold that personal jurisdiction is proper where a defendant purposefully aims its actions at the forum state, knowing that the injury would be felt most strongly there, because the

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defendant's Internet contacts). Additionally, the Eleventh and Federal Circuits have not definitively adopted or rejected the *Zippo* test. See *Roblor Mktg. Grp., Inc. v. GPS Indus., Inc.*, 645 F. Supp. 2d 1130, 1140–41 (S.D. Fla. 2009) (noting that the Federal Circuit and the Eleventh Circuit had not expressly adopted or rejected the *Zippo* test).

<sup>71</sup> King, *supra* note 70, at 81.

<sup>72</sup> See Donahue, *supra* note 9, at 9-22–9-24 (citing cases which have rejected or criticized the *Zippo* framework).

<sup>73</sup> *Id.* at 9-22.

<sup>74</sup> See King, *supra* note 70, at 86 (arguing that the *Zippo* test has failed to adapt to the fact that many websites now employ geolocation technologies, a potentially important factor to be considered in the jurisdictional analysis).

<sup>75</sup> Shmulevich, *supra* note 27, at 65.

<sup>76</sup> 465 U.S. 783 (1984).

<sup>77</sup> *Id.* at 784.

<sup>78</sup> *Id.* at 785.

<sup>79</sup> *Id.* at 785–86.

<sup>80</sup> *Id.* at 789.

defendant can “reasonably anticipate being haled into court there.”<sup>81</sup>

A few courts have exercised personal jurisdiction under the effects test even in the absence of evidence that the activity was specifically targeted on the theory that personal jurisdiction is proper whenever harm occurs in the forum state.<sup>82</sup> Most courts, however, hold that “the mere allegation that the plaintiff feels the effect of the defendant’s tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*.”<sup>83</sup>

It should be noted that the *Zippo* test and the effects test are not mutually exclusive because the applicability of the effects test has generally been limited to intellectual property and intentional tort claims.<sup>84</sup>

### C. *Stream of Commerce*

Stream of commerce doctrine was developed to apply to situations in which a defendant distributes products through a third party rather than by direct sales to customers, and the product is swept into the forum state through the “stream of commerce.”<sup>85</sup> The Supreme Court’s leading stream of commerce case is *Asahi Metal Industry Co. v. Superior Court*.<sup>86</sup> In *Asahi*, the Court was asked to determine whether

the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes “minimum contacts” between the defendant and the forum State such that the exercise of jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’”<sup>87</sup>

Divided into four-Justice pluralities, the Court was unable to decide whether the defendant had established minimum contacts.<sup>88</sup> Thus, the Justices articulated three different standards for establishing minimum contacts through the stream of commerce.

Justice O’Connor’s opinion stated that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant

<sup>81</sup> *Id.* at 789–90 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

<sup>82</sup> HART, *supra* note 44, at 677 (citing *Peregrine Fin. Grp., Inc. v. Green*, No. 01 C 2948, 2001 U.S. Dist. LEXIS 14317, at \*9–11 (N.D. Ill. Aug. 28, 2001)); *see, e.g.*, *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (exercising personal jurisdiction where an out-of-state defendant’s sole contact with the forum state was that he committed a tort and the harm was felt in the forum state).

<sup>83</sup> *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 263 (3d Cir. 1998).

<sup>84</sup> Shmulevich, *supra* note 27, at 65.

<sup>85</sup> Erik T. Moe, Comment, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive but Still Kicking*, 76 GEO. L.J. 203, 203 (1987).

<sup>86</sup> 480 U.S. 102 (1987).

<sup>87</sup> *Id.* at 105.

<sup>88</sup> *Id.*

purposefully directed toward the forum State.”<sup>89</sup> This test is often referred to as “stream of commerce plus.” A court may find purposeful direction where the defendant takes actions such as “designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”<sup>90</sup> However, mere awareness that the product will enter a forum state is not enough.<sup>91</sup>

Justice Brennan, in contrast, articulated a pure stream of commerce view where a showing of additional conduct purposefully directed at the forum state is unnecessary to establish personal jurisdiction.<sup>92</sup> Justice Brennan stated, “[a]s long as a participant [in placing a product into the stream of commerce] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”<sup>93</sup>

Finally, Justice Stevens wrote a brief concurrence in which he argued that whether a defendant’s conduct constitutes purposeful availment such that sufficient minimum contacts are established is affected “by the volume, the value, and the hazardous character of the components” placed into the stream of commerce.<sup>94</sup> Referencing the facts of the case, Justice Stevens concluded that “a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute ‘purposeful availment’ even though the item delivered to the forum State was a standard product marketed throughout the world.”<sup>95</sup>

When stream of commerce doctrine is applied to personal jurisdiction disputes based on the “electronic stream of commerce,” Justice O’Connor’s test has prevailed.<sup>96</sup> In a recent Supreme Court decision addressing stream of commerce doctrine, Justice Breyer rhetorically questioned the application of stream of commerce plus analysis to cases where the defendant “targets the world by selling products from its Web site.”<sup>97</sup> He further questioned how it would apply to situations where instead of shipping products directly to consumers, the defendant “consigns the products through an intermediary (say, Amazon.com) who

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<sup>89</sup> *Id.* at 112.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.* (“[A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.”).

<sup>92</sup> *Id.* at 117 (Brennan, J., concurring).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 122 (Stevens, J., concurring).

<sup>95</sup> *Id.*

<sup>96</sup> Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925, 932 (1998).

<sup>97</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (2011) (Breyer, J., concurring).

then receives and fulfills the orders.”<sup>98</sup> Lower courts have exercised personal jurisdiction over defendants in both of Justice Breyer’s scenarios, finding that the defendants purposefully availed themselves of the laws of the forum state by sending their products there.<sup>99</sup> In the first scenario, where the defendant directly sells and ships the goods, courts have generally relied on the *Zippo* test to find personal jurisdiction.<sup>100</sup> In the second scenario, courts have exercised personal jurisdiction over defendants in situations where the defendant conducts its business through an entity such as eBay or Amazon and offers shipping of its products throughout the United States and the world,<sup>101</sup> finding that the defendants had purposefully availed themselves of the privilege of doing business in the forum state.<sup>102</sup>

#### IV. APPS AND PERSONAL JURISDICTION

Because no court has ruled on the issue of personal jurisdiction and smartphone apps, this Part applies the different doctrines discussed in Part III to the fact pattern at the beginning of this Note to determine whether a court would find that the app created sufficient minimum contacts with the forum state such that personal jurisdiction is proper. Part IV.A. discusses the minimum contacts analysis. However, finding sufficient minimum contacts does not end the inquiry because a court must then determine whether exercising personal jurisdiction over the defendant would comply with traditional notions of fair play and substantial justice.<sup>103</sup> Therefore, this second step of the personal jurisdiction inquiry is discussed in Part IV.B.

##### A. *Minimum Contacts*

###### 1. *Traditional Personal Jurisdiction Doctrine*

Under the traditional doctrine, courts examine three elements to determine whether the defendant has sufficient minimum contacts with the forum state to be subjected to jurisdiction there: (1) the quality of the relationship between the defendant and the forum state;<sup>104</sup> (2) whether the defendant has purposefully availed itself of the laws of the jurisdiction;<sup>105</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Stream-of-Commerce*, *supra* note 33, at 318–19.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 319.

<sup>102</sup> See *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006) (exercising personal jurisdiction over a defendant who conducted business through eBay).

<sup>103</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>104</sup> *Id.* at 319.

<sup>105</sup> *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

and (3) whether being haled into court in the forum jurisdiction was foreseeable.<sup>106</sup>

In the fact pattern previously presented, the quality of the relationship between the defendant and Connecticut is relatively low. The defendant's contacts with Connecticut are not of the type to which courts generally look to find minimum contacts. The defendant does not live in Connecticut<sup>107</sup> and has never been to Connecticut. The defendant has not physically mailed or sent anything to Connecticut.<sup>108</sup> The defendant's only contact with Connecticut is the app, and the app was transmitted over the Internet by a third party. By traditional standards, the quality of this contact is weak.

On the other hand, a strong argument can be made that the defendant purposefully availed himself of the privilege of conducting activity in Connecticut. The defendant created the app with the intention that it would be downloaded worldwide. The more times the app is downloaded, the more income the defendant will receive (either directly from the sale of the app or from advertising revenues), and therefore the defendant has incentive to direct the app to the entire world.

It is true, however, that the defendant did not specifically reach out and avail himself of the laws of Connecticut.<sup>109</sup> Rather than reaching out to Connecticut, the defendant essentially reached out to every forum. However, the purposeful availment remains. This fact may be illustrated by the facts presented in *Keeton v. Hustler Magazine, Inc.*<sup>110</sup> The defendant, Hustler Magazine, was an Ohio-based corporation in the business of publishing and circulating a magazine nationwide, including in New Hampshire.<sup>111</sup> The plaintiff brought suit for libel in New Hampshire, and the Court held that personal jurisdiction was proper.<sup>112</sup> Even though the defendant had not specifically reached out to New Hampshire more than any other jurisdiction, because the magazines were circulated in New Hampshire, the defendant had availed itself of the opportunity to engage in in-state activities.<sup>113</sup>

The same reasoning can be applied to the contacts in question here. The defendant profits from making the app available to consumers in

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<sup>106</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

<sup>107</sup> *See Pennoyer v. Neff*, 95 U.S. 714, 724 (1878) ("Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him.").

<sup>108</sup> *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that personal jurisdiction was proper where the defendant mailed various documents to the plaintiff in California).

<sup>109</sup> *See id.* (finding that the defendant reached out to California when it specifically mailed documents to an individual living there).

<sup>110</sup> 465 U.S. 770 (1984).

<sup>111</sup> *Id.* at 772.

<sup>112</sup> *Id.* at 773.

<sup>113</sup> *Id.* at 774.

Connecticut and every state. The mere fact that the defendant has purposefully availed himself of doing business everywhere does not minimize the fact that he purposefully availed himself of doing business in Connecticut.<sup>114</sup> Thus, a court would likely conclude that the defendant purposefully availed himself of the laws of Connecticut.

It is also likely that a court would determine that it was foreseeable that the defendant could be haled into court in the forum state. Smartphone apps are made available to consumers through online “stores” that can be accessed from a user’s smartphone.<sup>115</sup> Because these stores are available anywhere that smartphones can access the Internet, apps are likewise available for download anywhere a user may access the Internet. As a result, it was foreseeable to the defendant that he could be haled into court anywhere that smartphones can access the Internet, which is virtually everywhere.

So would a court hold that there are sufficient minimum contacts to exercise personal jurisdiction over the defendant? Probably. In coming to this conclusion, it is helpful to compare the factual scenario at hand to another case that dealt with similar relevant facts.

In *Chloe v. Queen Bee of Beverly Hills, LLC*,<sup>116</sup> the Second Circuit held that sufficient minimum contacts existed between the defendant and New York, the forum state, to exercise personal jurisdiction over the defendant.<sup>117</sup> Queen Bee, an Alabama corporation, operated a website which sold counterfeit designer bags to consumers throughout the United States and select locations worldwide.<sup>118</sup> The defendant’s only contacts with New York were its website and the fact that at least one bag had been sold to a customer in New York.<sup>119</sup> By selling at least one bag to a customer in New York, the court stated that the defendant had “purposefully avail[ed] [him]self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”<sup>120</sup> Furthermore, because the bag was actually purchased and shipped to a customer in New York, as opposed to a New York resident

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<sup>114</sup> See *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 243 (2d Cir. 1999) (holding that personal jurisdiction was proper where a sales agreement indicating that a product would be sold worldwide was evidence of an attempt to serve the market of the forum state).

<sup>115</sup> See *supra* Part II.

<sup>116</sup> 616 F.3d 158 (2d Cir. 2010).

<sup>117</sup> *Id.* at 171. I purposefully selected a case from the Second Circuit because the Second Circuit has not adopted the *Zippo* test. See *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 252 (2d Cir. 2007). Because this section of the Note is devoted to assessing minimum contacts under traditional personal jurisdiction doctrine, and the *Zippo* framework is discussed in Part IV.A.2, using a case that assessed Internet contacts without relying on *Zippo* is necessary to distinguish the two doctrinal approaches.

<sup>118</sup> *Chloe*, 616 F.3d at 162.

<sup>119</sup> *Id.* at 171.

<sup>120</sup> *Id.* (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

merely viewing the defendant's website, "there can be no doubt that [the defendant's] conduct was 'purposefully directed toward the forum State.'"<sup>121</sup> Even though the defendant's contacts with the forum state were fairly limited, the court held that sufficient minimum contacts existed because the defendant purposefully availed itself of the privileges of conducting activities in New York.

The facts in the present case are similar. While the defendant's contacts with the forum state are limited to creating an app that can be, and was, downloaded in the forum state, the defendant has purposefully availed itself of the privilege to conduct activity within the forum state. Therefore, a court would likely determine that sufficient minimum contacts exist.

## 2. Zippo "Sliding Scale" Test

The *Zippo* test evaluates a defendant's Internet contacts by examining the nature and the quality of the commercial activity that a defendant conducts over the Internet.<sup>122</sup> In attempting to evaluate that activity, the *Zippo* framework instructs courts to place a defendant's website into one of three categories: (1) passive; (2) interactive; or (3) between passive and interactive.<sup>123</sup>

In the present case, the defendant's app is not a website, *per se*. However, for the purposes of the minimum contacts inquiry, the two can and should be treated the same.<sup>124</sup> Under the *Zippo* framework, the app likely falls in the middle ground between passive and interactive. To begin with, the app is downloaded from the Internet. Because the download involves an interaction between the smartphone and the host computer, the app is not passive.<sup>125</sup> Furthermore, the app itself is not passive. The app does more than simply provide uniform information to the user; it provides a search function so that users can look up the weather for a particular location. This search function is another exchange of information between the user and the host computer; therefore, the app is not passive.

Additionally, the app is at least minimally commercial because the defendant profits from making the app available. Although the app may be downloaded for free, the defendant provides advertising space on the apps. The more times that the app is downloaded, the more the defendant is able to charge for the advertising space. Therefore, the defendant profits from making the app widely available.

At the same time, however, the defendant's app does not fall into the interactive category. To determine if the website is interactive, courts look

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<sup>121</sup> *Id.* (quoting *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 112 (1987)).

<sup>122</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

<sup>123</sup> *Id.*

<sup>124</sup> *See supra* Part II.

<sup>125</sup> *See Shmulevich, supra* note 27, at 76.

to whether the defendant conducts business and enters into contracts over the Internet, and whether the defendant engages in a knowing and repeated transmission of files over the Internet.<sup>126</sup> Apart from providing advertising space on the apps, the defendant does not conduct business over the Internet because the app may be downloaded for free.<sup>127</sup> The defendant *does* enter into agreements over the Internet because when a user downloads the defendant's app, or any other app, he must agree to the terms and conditions of the provided click-wrap agreement.<sup>128</sup> However, this agreement is not a traditional contract for goods or services as envisioned by the *Zippo* court because there is no monetary exchange. Finally, the defendant does not engage in the knowing and repeated transmission of files over the Internet. While the defendant's host computer transmits files and information over the Internet, it is not clear that the transmission is "knowingly" conducted by the defendant. The download and search functions are automated, so the defendant does not actively engage in contact with users once the app has been created.

As a result, the app likely falls somewhere in the middle ground between passive and interactive. When an app falls in this category, courts assess whether there are sufficient minimum contacts by looking to the level of interactivity, the commercial nature of the website, and the extent of actual interaction between the defendant's website and residents of the forum state.<sup>129</sup>

In the present case, the level of interactivity is moderate. The user interacts with the host computer when he downloads the app and subsequently whenever he conducts a search using the app. Additionally, an argument has been made that the geolocation aspect of an app should militate in favor of finding minimum contacts.<sup>130</sup> Customizing the app to account for the location in which it is being used constitutes a form of interactivity.<sup>131</sup> However, the interactivity is not as high as the interactivity of a website that allows a user to make purchases online, for instance. The app simply provides the information that is queried. A website that allows purchases, on the other hand, creates a sales agreement, charges the individual's form of payment, sends out confirmation emails, and puts the

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<sup>126</sup> *Zippo*, 952 F. Supp. at 1124.

<sup>127</sup> See Shmulevich, *supra* note 27, at 76. If users were required to pay for the app, that would constitute doing business over the Internet.

<sup>128</sup> A "click-wrap agreement" is a contract that is created when "one party sets up a proposed electronic form agreement to which another party may assent by clicking an icon or a button or by typing in a set of specified words." Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401, 401 (2001).

<sup>129</sup> *Zippo*, 952 F. Supp. at 1124.

<sup>130</sup> See King, *supra* note 70, at 90 (arguing that when websites use geolocation technology to customize their content, that technology increases the interactivity of the website under the *Zippo* analysis).

<sup>131</sup> *Id.*

order into production.

The commercial nature of the app is also moderate. The defendant does not directly profit by selling a good to the user. Instead, the commercial nature is indirect because the defendant solicits advertisers who pay the defendant for allowing them to, at least theoretically, profit from the app's users. However, the link between soliciting advertisements and finding that the app is of a commercial nature should not be understated. The case law supports the assertion that when a defendant website owner profits by selling ad space on his website, that commercial transaction makes it more likely that personal jurisdiction is proper. In *Gather, Inc. v. Gatheroo, LLC*,<sup>132</sup> the court assessed how advertisements on the defendant's website affected the jurisdictional analysis.<sup>133</sup> The defendant solicited advertisers to place ads on its website, and those advertisements were made available to users in the forum state.<sup>134</sup> Because the defendant essentially solicited revenue from users who viewed its website by exposing them to the advertisements, the court held that personal jurisdiction was proper.<sup>135</sup> Likewise, in *LFG, LLC v. Zapata Corp.*,<sup>136</sup> the court held that minimum contacts existed under the *Zippo* framework when the defendant's website contained advertisements.<sup>137</sup> The defendant encouraged users to join the website's mailing list in order to increase the number of subscribers because by increasing that number, the defendant's ability to earn revenue from advertisements on its website increased.<sup>138</sup>

The last factor to which courts look—the extent of the interaction between the website and residents of the forum state—weighs in favor of exercising personal jurisdiction. Because the app has been downloaded and continues to be available for download in Connecticut, there is considerable interaction between the app and residents of Connecticut.

Weighing the interactivity of the app and the commercial nature, a court would likely conclude that the app creates sufficient minimum contacts with the forum state. While the advertisements alone are insufficient to create minimum contacts<sup>139</sup> and the interactivity of the app is insufficient to create minimum contacts without also having the

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<sup>132</sup> 443 F. Supp. 2d 108 (D. Mass 2006).

<sup>133</sup> *Id.* at 116.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 78 F. Supp. 2d 731 (N.D. Ill. 1999).

<sup>137</sup> *Id.* at 736–37.

<sup>138</sup> *Id.* at 737.

<sup>139</sup> Shmulevich, *supra* note 27, at 63–64 (citing *Cybersell v. Cybersell*, 130 F.3d 414, 419–20 (9th Cir. 1997)).

commercial aspect,<sup>140</sup> taken together, the contacts are likely sufficient to establish sufficient minimum contacts such that personal jurisdiction would be proper under *Zippo*.

### 3. *Calder v. Jones Effects Test*

The effects test is premised on the idea that personal jurisdiction is proper when the jurisdiction is the focal point of where the harm has been suffered and the defendant purposefully aimed his activities at the forum state.<sup>141</sup> Because the defendant aimed his activities at the forum state, he can reasonably anticipate being haled into court there.<sup>142</sup>

In the present case, the plaintiff brought the action in the state where it is incorporated and headquartered. Because the defendant's app infringes on the plaintiff's ability to profit by using its data without paying the licensing fee, the harm is felt at the plaintiff's principal place of business, and therefore Connecticut is the focal point of the harm suffered.

Most courts agree, however, that it is not enough that the harm of the defendant's conduct is felt in the forum state;<sup>143</sup> the defendant must have also purposefully directed his activities at the forum state. In the present case, it is doubtful that a court would find that the creator of the app purposefully directed his activities at the forum state. It is unknown whether the defendant knew that the plaintiff's principal place of business was in Connecticut. It is also unknown whether the defendant even knew that he was stealing the plaintiff's data because it is possible that he was taking it from one of the plaintiff's licensees.

An argument could be made that the geolocation aspect of the app suggests that the defendant purposefully directed his activities at the forum state. However, the same issue arises as with purposeful availment in the Internet context: because the defendant has directed his activities at every state, does that lessen the fact that the app is also customized for the forum state?<sup>144</sup> For the purposes of the effects test, it likely would. The effects test examines whether there was purposeful direction to determine whether litigating in a particular forum would have been foreseeable to the defendant, and therefore, directing activities at every state through a geolocation device would unlikely be sufficient to satisfy the purposeful

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<sup>140</sup> See *id.* at 76 ("Regardless of how the term interactive is defined, there can be no personal jurisdiction over [the defendant] because its activity on the web site is not commercial.")

<sup>141</sup> *Calder v. Jones*, 465 U.S. 783, 789–90 (1983).

<sup>142</sup> *Id.*

<sup>143</sup> See *supra* text accompanying notes 82–83.

<sup>144</sup> Kevin F. King does not address this issue. Rather, he addresses the effects test under a defamation hypothetical and concludes that because the comments are addressed towards a resident of the forum state, the presence of geolocation technology on a website would be superfluous to the inquiry. King, *supra* note 70, at 90–91.

direction prong.

Without specific evidence that the defendant knew that he would cause harm to the plaintiff in Connecticut and that he purposefully directed his actions there, a court would be unlikely to find that the defendant could have reasonably anticipated being haled into court there. Therefore, the exercise of personal jurisdiction over the defendant would not be proper.

#### 4. *Stream of Commerce*

The stream of commerce test is meant to assess a defendant's contacts with the forum state where the defendant placed a good into the stream of commerce and the good ended up in the forum state. The issue of apps, as with the Internet, is similar to the stream of commerce, in that once the app is created, the creator "may have some idea of where it will end up, but not total control."<sup>145</sup> In this case, the defendant placed his app into the electronic stream of commerce. He created the app and then submitted it to one of the smartphone retailers so that it would be available to smartphone users through an online store such as Apple's App Store or Android's Marketplace. The user then downloaded the app, bringing it into the forum state.

Courts have held that personal jurisdiction is proper where the defendant sells its products through an online retailer.<sup>146</sup> However, more than simply putting the product into the stream of commerce is required under Justice O'Connor's "stream of commerce plus" doctrine, which is the most widely accepted doctrine for evaluating electronic stream of commerce cases.<sup>147</sup> To find sufficient minimum contacts, the defendant must have purposefully directed its products at the forum state.<sup>148</sup> This requirement makes sense "[b]ecause a web site is accessible at all times to Internet users in any particular forum, [so] it is reasonable to require additional conduct. . . . Otherwise, personal jurisdiction over [app] creators would have no rational limits."<sup>149</sup> The courts are divided regarding exactly how much more additional conduct is required to find sufficient minimum contacts. Some courts have concluded that any additional conduct is sufficient,<sup>150</sup> while others have required additional conduct related to the plaintiff's claim, such as shipping offending products into the forum state or entering into "agreements to provide online services to substantial

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<sup>145</sup> MacDonald, *supra* note 8, at 548.

<sup>146</sup> Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 822 (E.D. Mich. 2006).

<sup>147</sup> Stravitz, *Personal Jurisdiction in Cyberspace*, *supra* note 96, at 932.

<sup>148</sup> Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 105 (1987).

<sup>149</sup> Stravitz, *Personal Jurisdiction in Cyberspace*, *supra* note 96, at 939.

<sup>150</sup> *Id.* For example, one court found that there was sufficient additional conduct when the defendant's website had six subscribers who lived in the forum state. *Am. Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 499 (S.D.N.Y. 1997).

numbers of forum state residents.<sup>151</sup>

In the present case, the defendant has done more than simply create a website. While the app is in many ways analogous to a website for the minimum contacts inquiry, the app itself is more: it is downloaded onto the smartphone and is accessible at any time. It is as if the user has physically downloaded computer software onto his phone. Furthermore, the app satisfies the two foregoing examples of how that additional conduct can be satisfied. The defendant essentially ships the app into the forum state over the electronic stream of commerce, and when the app is downloaded, the defendant is agreeing to provide online services (i.e. weather data) to the user.

Additionally, the use of geolocation technology potentially plays an important role in the stream of commerce inquiry. The defendant has purposefully customized the product for use in the forum state. When looking for purposeful direction, courts frequently look to whether the defendant has customized the product in some way for the forum, such as a French company's labeling of water bottles in ounces rather than metric measurements so that they can be sold in the American market.<sup>152</sup> Likewise, the defendant's app would be essentially useless to users in Connecticut if the app only displayed the weather for California. Because the defendant purposefully chose to tailor the app to a user's location, he could reasonably anticipate being haled into court wherever the app was accessed.

When the defendant created the app and made it available for download from one of the various smartphone app stores, the defendant placed his app into the stream of commerce. By utilizing geolocation technology and doing more than simply creating a website, the defendant purposefully directed his activities at the forum state. Therefore, a court would likely conclude that minimum contacts are satisfied.

#### B. *Fair Play and Substantial Justice*

If a court holds that the defendant has sufficient minimum contacts with the forum state, the court must then determine whether exercising jurisdiction over the defendant would comply with traditional notions of fair play and substantial justice. The court will consider (1) the burden on the defendant of having to litigate in a foreign state; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest

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<sup>151</sup> Stravitz, *Personal Jurisdiction in Cyberspace*, *supra* note 96, at 939.

<sup>152</sup> See *In re Perrier Bottled Water Litig.*, 754 F. Supp. 264, 268 (D. Conn. 1990) (holding that the exercise of personal jurisdiction over Perrier was valid under the stream-of-commerce doctrine because Perrier had designed its product for the U.S. market by labeling the bottles in ounces rather than metric measurements).

in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies.<sup>153</sup>

### 1. *The Burden on the Defendant*

The burden on the defendant is the most important of the five factors because it lies at the heart of the fairness inquiry.<sup>154</sup> While a plaintiff can decide not to sue or to sue elsewhere if the burden of trial is too great, a defendant does not have such an alternative.<sup>155</sup> In examining the defendant's burden, courts will consider such factors as the distance between the defendant's state of residence and the forum state,<sup>156</sup> the defendant's financial resources (in absolute terms and as compared to the plaintiff),<sup>157</sup> and the defendant's ability to retain local counsel in the forum state.<sup>158</sup>

In the present case, the burden on the defendant is likely to be heavy. The defendant lives in California and the plaintiff has filed suit in Connecticut. Courts have given significant weight to the burden on the defendant in the fairness inquiry when the defendant was faced with a similar distance between his home state and the forum.<sup>159</sup> Additionally, there are no mitigating factors to suggest that the distance is not a significant burden for the defendant. Many apps, including the one in the fact pattern, are created by a single individual who saw a need or an interest in a particular kind of app. Because the barriers to entry are quite low, almost anyone, including teenagers, can create an app. Therefore, the burden on the defendant will be high if he has to travel to Connecticut to defend the instant lawsuit. Additionally, the disparity in financial resources between the plaintiff and the defendant suggest that it would be

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<sup>153</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

<sup>154</sup> *See id.* (stating that the burden on the defendant is a primary concern in evaluating the reasonableness of exercising jurisdiction over the defendant in the forum state).

<sup>155</sup> *Ins. Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981).

<sup>156</sup> *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 210 (1st Cir. 1994) ("[M]ost of the cases that have been dismissed on grounds of unreasonableness are cases in which the defendant's center of gravity, be it place of residence or place of business, was located at an appreciable distance from the forum.").

<sup>157</sup> *See Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1276 (11th Cir. 2002) (finding that the burden on the defendant of litigating in a foreign jurisdiction was insignificant because the defendant was a large corporation with substantial financial resources and the plaintiffs had a combined annual salary of only \$37,833).

<sup>158</sup> *See Am. Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988) (determining that the burden on the defendant was not unduly heavy because he was represented by an attorney in the forum state).

<sup>159</sup> *See, e.g., Ticketmaster*, 26 F.3d at 210 ("The burden associated with forcing a California resident to appear in a Massachusetts court is onerous in terms of distance. . . . This burden, and its inevitable concomitant, great inconvenience, are entitled to substantial weight in calibrating the jurisdictional scales.").

unfair to subject the defendant to jurisdiction in Connecticut. The defendant will be forced to hire local counsel and travel to Connecticut to defend the suit; such actions may cripple the defendant financially and impose a significant burden. However, even serious burdens on a defendant are not dispositive and may be outweighed by other factors.<sup>160</sup>

## 2. *The Forum State's Interest*

The forum state's interest in adjudicating the dispute is one of the most important of the five factors in the fairness inquiry.<sup>161</sup> When considering the state's interest, courts consider whether the forum state has "a legitimate concern with the outcome of the litigation," most commonly because of the forum state's interest in applying its own law or the need to protect residents of the forum.<sup>162</sup> The Supreme Court has articulated that a state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."<sup>163</sup> However, it is unclear what factors would make a forum state's interest stronger or weaker.

Connecticut has a significant interest in adjudicating the dispute in the present case. The company has suffered harm by an out-of-state actor, and Connecticut has an interest in providing the company with a convenient forum in which to litigate. Additionally, Connecticut has enacted laws such as the Connecticut Unfair Trade Practices Act<sup>164</sup> to protect the public from unfair practices involving trade or commerce.<sup>165</sup> Such actions by the state legislature suggest that Connecticut has an interest in applying its own law in the present case. Therefore, Connecticut has a strong interest in adjudicating the present dispute.

## 3. *The Plaintiff's Interest*

Many courts conclude, with little discussion, that the plaintiff has an interest in adjudicating his claim in the forum where it was filed.<sup>166</sup> After all, the plaintiff likely selected the forum for a reason. As a result, a number of courts have de-emphasized the importance of this factor, finding

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<sup>160</sup> See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987) ("[W]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.").

<sup>161</sup> Abramson, *supra* note 40, at 451.

<sup>162</sup> *Id.* at 452.

<sup>163</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). When the plaintiff is not a resident of the forum state, the state's "legitimate interests in the dispute have considerably diminished." *Asahi*, 480 U.S. at 114.

<sup>164</sup> CONN. GEN. STAT. § 42-110b (2006).

<sup>165</sup> *Eder Bros., Inc. v. Wine Merch. of Conn.*, 275 Conn. 363, 380, 880 A.2d 138, 149 (2005).

<sup>166</sup> See *Roth v. Garcia Marquez*, 942 F.2d 617, 624 (9th Cir. 1991) ("No doctorate in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's preference.").

that the plaintiff's convenience does not significantly influence the fairness inquiry.<sup>167</sup> However, many courts will examine the weight of the plaintiff's interest by considering such factors as the plaintiff's likelihood of recovery or enforcing a judgment in another forum and the (in)convenience of litigating elsewhere.<sup>168</sup>

In the present case, the plaintiff's likelihood of recovery would unlikely to be affected if the case were litigated in another forum. While there may be some, ever so slight advantage to having a "home-town" jury,<sup>169</sup> there is nothing to suggest that litigating in another state would truly affect the plaintiff's likelihood of recovery. Courts examining this factor are generally concerned with the ability of a plaintiff to recover or enforce a judgment entered in a foreign jurisdiction;<sup>170</sup> unless there are specific reasons that litigating in a particular forum within the United States would be unfair, any plaintiff's likelihood of recovery should be substantially the same across all states. Therefore, this factor does not suggest that the plaintiff's interest in litigating in the forum state is significant.

The inconvenience of litigating in another forum is also not significantly weighty. It will certainly be easier for the plaintiff to litigate in the state where the company is incorporated, but courts balance the plaintiff's convenience against that of the defendant. When the plaintiff is a corporate entity, with the resources to litigate in another forum, "the weight a court accords to the plaintiff's interest is not as significant."<sup>171</sup> Because the plaintiff in the current case is better equipped to litigate in a distant forum than is the defendant, a court is unlikely to find that the plaintiff's interest in litigating in Connecticut is very strong.

Because the above factors do not suggest that the plaintiff has a particularly strong interest in litigating its claim in Connecticut, this factor weighs only slightly in favor of the plaintiff.

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<sup>167</sup> See, e.g., *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 129 (9th Cir. 1995) ("Although the importance of the forum to the plaintiff nominally remains part of this test, cases have cast doubt on its significance . . . [the plaintiff's] convenience does not significantly influence our analysis."). *But cf. Asahi*, 480 U.S. at 114 ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.").

<sup>168</sup> Abramson, *supra* note 40, at 456–58.

<sup>169</sup> See *Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp.*, 2 F. Supp. 2d 1345, 1352 (D. Colo. 1998) (discussing how jurors may be biased in favor of a local company that is a major employer for the area).

<sup>170</sup> See, e.g., *Karsten Mfg. Corp. v. U.S. Golf Ass'n*, 728 F. Supp. 1429, 1435 (D. Ariz. 1990) (finding the plaintiff's interest to be significant where a foreign court would not enforce U.S. antitrust laws).

<sup>171</sup> Abramson, *supra* note 40, at 457.

#### 4. *The Interstate Judicial System's Interest*

In evaluating this factor, courts seek to determine whether it would be efficient to litigate the case in the forum state. As one court has stated, “[k]ey to this inquiry are the location of the witnesses, where the wrong underlying the lawsuit occurred, what forum’s substantive law governs the case, and whether jurisdiction is necessary to prevent piecemeal litigation.”<sup>172</sup>

Many of the witnesses in the present case are likely located in Connecticut because the plaintiff will likely call a number of its employees as witnesses. There will also be witnesses located in California (who could attest to the defendant’s conduct) and in other areas of the United States (such as technology experts who can testify to how the defendant acquired the plaintiff’s weather information). However, Connecticut is likely home to the greatest number of witnesses.

It is unclear where the wrong underlying the suit occurred. It could be argued that it occurred in California when the defendant created the app. It could be argued that the wrong essentially happened in cyberspace and did not physically occur anywhere. It could be argued that because the harm was felt in Connecticut, the wrong occurred in Connecticut. However, it is unclear where a court would conclude the harm occurred.

Because the plaintiff chose to bring the case in Connecticut, the plaintiff likely chose to invoke Connecticut substantive law. There is nothing to suggest that the law of any other state would apply to this dispute.

Finally, the fact pattern does not address whether there will be other parties joined in the suit. Assuming no other parties are joined, there is not a concern for piecemeal litigation.

Therefore, Connecticut is almost certainly the most efficient forum in which to litigate the case, and this factor weighs in favor of exercising personal jurisdiction over the defendant in Connecticut. However, most courts accord the interstate judicial system’s interest in the efficient resolution of controversies less weight than is given to the defendant’s interest, the plaintiff’s interest, and the forum state’s interest.<sup>173</sup>

#### 5. *The Shared Interest of the Several States*

Finally, courts consider the shared interest of the several states in furthering fundamental substantive social policies. What this means is that the court must consider the “procedural and substantive policies of other [states and] nations whose interests are affected by the assertion of

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<sup>172</sup> *Emp’rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1163 (10th Cir. 2010).

<sup>173</sup> Abramson, *supra* note 40, at 460.

jurisdiction by the [forum state].”<sup>174</sup> In reality, however, few courts give this factor individualized consideration (or indeed consideration at all) because they treat it as closely related to the to interstate judicial system’s interest and the forum state’s interest.<sup>175</sup> The exception is when the dispute is between nations, rather than states, because there may be significant sovereignty concerns.<sup>176</sup>

In the present case, the parties are both domestic, so a court is unlikely to give the shared interests of the several states much consideration. There likely is a shared interest between the states in providing a forum for residents (both individual and corporate) when they are harmed. This shared interest would certainly weigh in favor of exercising personal jurisdiction over the defendant in Connecticut and, as discussed previously, Connecticut’s interest is fairly strong. However, because courts are reluctant to give this factor much, if any, consideration, a court would likely find that this factor only weighs slightly in favor of exercising jurisdiction in Connecticut.

#### 6. *Weighing the Factors*

It is unclear how a court would balance these factors because courts differ significantly on how much weight they ascribe to each factor. Only the first factor weighs in favor of the defendant so, all things being equal, it would appear that the plaintiff and Connecticut should prevail. However, there is an argument to be made that a court in Connecticut should not exercise jurisdiction over the defendant. Although four factors favor the plaintiff and exercising jurisdiction in Connecticut, with the exception of the forum state’s interest, they do not *strongly* favor exercising jurisdiction in Connecticut. Therefore, if the analysis essentially boils down to balancing the forum state’s interest in protecting its citizens against the significant burden imposed on the defendant of having to litigate in a distant state, it seems just that the defendant prevail. Connecticut may have an interest in protecting its citizens, but we should have faith that its citizens would also be adequately and fairly protected in the courts of other states. The defendant, however, may not be able to adequately defend himself in Connecticut because of the potentially staggering costs of frequent trips across the United States and obtaining local counsel. If the crux of the inquiry is meant to be fairness, would it not be more fair to protect the interests of an individual over the interests of a state?

This argument is not meant to be predictive, but rather it is meant to

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<sup>174</sup> *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 115 (1987) (emphasis omitted).

<sup>175</sup> Abramson, *supra* note 40, at 465.

<sup>176</sup> *See id.* at 465–68 (discussing judicial consideration of the “shared interests” factor with regard to international and domestic defendants).

show that perhaps this case would be a close call—indeed, many courts would likely conclude that exercising personal jurisdiction over the defendant in Connecticut would be fair. However, the low barriers to entry for creating apps increases the probability that legally unsophisticated individuals with limited means will be pitted against large corporations. In such situations, even though minimum contacts may exist, the courts should thoughtfully consider whether exercising personal jurisdiction over such an individual would in fact comply with traditional notions of fair play and substantial justice.

## V. CONCLUSION

Because courts have not evaluated personal jurisdiction doctrine as it relates to apps, the question raised by apps can only be addressed by analogizing to issues that the courts have previously addressed. As shown above, there are a number of ways in which minimum contacts can be assessed, but which makes the most sense for apps?

The traditional personal jurisdiction analysis remains the best way to assess whether sufficient minimum contacts are established through a smartphone app and whether personal jurisdiction is proper. Apps do not fit squarely into the Internet jurisdiction frameworks because they are something more than just a website. Additionally, they do not fit well into stream of commerce or electronic stream-of-commerce because apps are at once both a good and electronic.

The traditional analysis, on the other hand, has the flexibility to take into account all of the ways that the defendant, through the app, interacts with a forum state. As shown in Part IV, much of the analysis is very fact-sensitive, and that fact-sensitivity is needed when assessing apps because they are all so different. Not all apps are free. Not all apps utilize geolocation technology. Not all apps even need to access the Internet after they have been downloaded. A specialized framework cannot account for all of these differences, and in fact the *Zippo* framework has been criticized for precisely that failure.<sup>177</sup> What is needed is a balanced approach that accounts for the all of the complexities and unique characteristics of apps, and that can only be accomplished by assessing apps under the traditional personal jurisdiction analysis.

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<sup>177</sup> See King, *supra* note 70, at 83 (stating that some circuits have criticized *Zippo* for being too simplistic for regular use).

